

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

74 - 2249

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

-against-

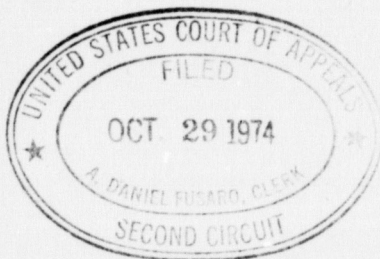
HUMBERTO FLORES,

Appellant.

Docket No. 74-2249

BRIEF FOR APPELLANT

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK



WILLIAM J. GALLAGHER, ESQ.,
THE LEGAL AID SOCIETY,
Attorney for Appellant
FEDERAL DEFENDER SERVICES UNIT
509 United States Court House
Foley Square
New York, New York 10007
(212) 732-2971

WILLIAM EPSTEIN,
Of Counsel

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QUESTION PRESENTED

Whether the District Court had the power at the remand proceeding to decide whether the oral advice to the District Court on June 28, 1973, that the Government was ready for trial constituted compliance with the six-month requirement of the Prompt Disposition Rules.

STATEMENT PURSUANT TO RULE 28(3)

Preliminary Statement

This is an appeal from a judgment of the United States District Court for the Eastern District of New York (The Honorable Mark A. Costantino) rendered October 21, 1974, convicting appellant Humberto Flores of conspiracy to import cocaine and importation of cocaine, following reversal and remand by this Court of appellant's original conviction (Docket No. 74-1186, August 7, 1974).

Appellant was sentenced to imprisonment for a term of eight years and to a special parole term of five years, the sentence to commence from the time of appellant's original conviction, February 8, 1974.

The Legal Aid Society, Federal Defender Services Unit, was continued as counsel on appeal pursuant to the Criminal Justice Act.

Statement of Facts

Humberto Flores was originally convicted on February 8, 1974, before Judge Costantino and a jury, of importation of cocaine. Prior to trial, appellant had sought dismissal of the indictment on the ground that the Government had failed to be ready for trial within six months of appellant's arrest, as required by the Eastern District Plan for Achieving Prompt

Disposition of Criminal Cases (hereinafter called "Plan"). Appellant argued that the six-month period commenced upon his arrest on September 28, 1972 (after which a complaint was filed), rather than on June 18, 1973, the date of the filing of the indictment. The Government maintained that because the complaint was dismissed on February 23, 1973, the six-month period should have begun on the date of the indictment, June 19, 1973. The District Court denied appellant's motion to dismiss the indictment, ruling that, since the February 23, 1973, dismissal freed appellant from the threat of criminal liability, the six-month period commenced only upon the later attachment of liability, the date of the indictment. (Memorandum and Order, October 15, 1973).

On August 7, 1974, after an appeal, this Court ruled that the Government was chargeable with the period between appellant's arrest and the dismissal of the complaint, a period of just under five months, and the period after the indictment was handed down (June 19, 1973) until the filing of the notice of readiness (July 24, 1973), a period of five weeks. United States v. Flores, Doc. No. 74-1186 (2d Cir., August 7, 1974), slip opinion at 5149-50, fn. Thus, the total period of delay was just over six months. This Court then remanded the case with the following order:

We are left then with an argument not made before us, namely that during the period June 19 to June 28, appellant may have been a fugitive whose absence or unavailability in a recognizable sense re-

sulted in a delay which would toll the period pursuant to Rule 5(d). See note 2 supra. The record before us is not clear whether appellant was indeed absent (that is, according to the rule, whether his location was unknown) or unavailable (that is, his location was known but his presence could not be obtained by due diligence) so as to be a fugitive. It is, moreover, even less clear whether the nine day period between appellant's indictment and second arrest resulted in any delay to the Government in the time it should have been "ready for trial." If indeed appellant were absent or unavailable during that period, and if indeed the Government's readiness to go to trial was delayed thereby, then that nine day period would be exempted from the period within which the Government had to be ready, putting the total period just under six months. If, however, these conditions are not met, then the district court should dismiss the indictment against appellant with prejudice.

United States v. Flores,
supra, slip opinion at
5151-52.

On October 1, 1974, appellant appeared before the District Court prepared for the hearing on the issue specified by this Court -- whether appellant was absent or unavailable during the period between June 19 to 28, 1973, and, if he was absent or unavailable, whether the preparation of the Government's case was delayed thereby. At the commencement of the proceeding, however, the Assistant United States Attorney, Paul Bergman, represented to the District Court that the Government wished to present three new issues for consideration: whether the Government satisfied its burden of notifying the court of its readiness for trial by orally an-

nouncing its readiness at appellant's arraignment on June 28, 1973, rather than, as the Government argued in this Court, upon the filing of a formal Notice of Readiness on July 24, 1973; whether, regardless of the date of the Government's readiness, the Government was entitled to an exception from the six-month requirement because of the "excusable neglect" provisions of Rule 4 of the Plan, rather than because of the "exceptional circumstances" (21-23*) (Rule 5(h)), or "unavailability" of a witness (Rule 5(c)(i)), as the Government argued before both the District Court and this Court; and whether, regardless of the Government's readiness for trial, and despite the absence of an exception to the six-month period, the District Court should refuse to dismiss the indictment because the Plan was unconstitutional.

Appellant objected to the Government's attempt to raise these three issues, arguing that the District Court had power to consider only the specific question contained in the remand mandate of this Court (25, 27-28, 32-34, 39, and appellant's memorandum of law dated October 2, 1974).

During the course of the remand hearing, Judge Costantino sustained defense counsel's assertion that the Government was precluded from arguing the excusable neglect exception and the

*Numerals in parentheses refer to pages of the transcript of the remand hearing held on October 1 and 2, 1974.

unconstitutionality of the Plan, but he did permit the Government to introduce evidence of the June 28 oral announcement of readiness (96, 107). Following the remand hearing, Judge Costantino ruled that appellant had not been absent or unavailable during the June 19-28, 1973, period* -- the issue left open by this Court's remand mandate. Despite this ruling, he refused to dismiss the indictment:

... A contention first raised at this time is dispositive of the Rule 4 question. This contention is that the Government complied with Rule 4 by reason of the Assistant United States Attorney's oral statement of readiness at defendant's June 28 arraignment.

(137-38).

Following the denial of dismissal of the indictment, Judge Costantino entered a new judgment of conviction.

*Appellant called several witnesses who testified that during the period in question he was at all times at home and at work in the family diner. The witnesses were Susan Petrick, a waitress at the diner (40-48); two patrons of the diner, Michael Martone (48-54) and Juan Nodar (55-60); and appellant's wife, Margaret Flores (60-68). Also testifying at the hearing was the principal case agent, John Daniocek, who related that he was aware of appellant's residence and place of employment, but made no effort to contact appellant prior to the time of the arrest, June 27, 1974, at 7:30 p.m. (107-35).

ARGUMENT

THE DISTRICT COURT WAS WITHOUT POWER AT THE REMAND HEARING TO DECIDE WHETHER THE ORAL ADVICE TO THE DISTRICT COURT ON JUNE 28, 1973, THAT THE GOVERNMENT WAS READY FOR TRIAL CONSTITUTED COMPLIANCE WITH THE SIX-MONTH REQUIREMENT OF THE PROMPT DISPOSITION RULES.

In a memorandum of law handed to the District Court and defense counsel at the commencement of the remand hearing on October 1, 1974, the Government asserted that, regardless of appellant's availability during June 19-28, 1973 (the only issue left unresolved by this Court's mandate), the District Court should consider that oral notice of readiness was given to the District Court at appellant's arraignment on June 28, 1973, just within the six-month period, and not on July 24, 1973, by formal Notice of Readiness, as the Government had previously argued.*

Throughout this case, the Government, the District Court, this Court, and appellant have relied on the July 24, 1973, Notice of Readiness as the date on which the six-month period ceased to run. The July 24, 1973, date was cited by the Dis-

*The Government also demanded permission to make two more previously unasserted arguments -- that the Government was excused from compliance with the six-month rule because of excusable neglect, and that, regardless of the Government's compliance with the Prompt Disposition Plan, the indictment should not be dismissed because the Plan was unconstitutional. Judge Costantino ruled, however, that this Court's opinion and the Government's failure to urge these arguments at trial foreclosed consideration of these points.

trict Court in its opinion denying dismissal of the indictment for violation of the Prompt Disposition Rules (Memorandum and Order, October 15, 1973, at 2). In its brief on appeal, co-authored by Assistant United States Attorney Paul Bergman, the Government asserted that notification of readiness was given on July 24, 1973 (Government's Brief on Appeal, at 4). This Court explicitly adopted that date (United States v. Flores, Doc. No. 74-1186 (2d Cir., August 7, 1974), slip opinion at 5148). Following the decision by this Court on August 7, 1974, the Government, on August 20, 1974, made a motion for an extension of time in which to file for rehearing. In his affidavit in support of the motion Mr. Bergman again relied on the July 24, 1973, Notice of Readiness, omitting any reference to the June 28 oral notice issue (Affidavit of Paul Bergman, August 20, 1974, at 2). On September 3, 1974, this Court denied the Government's motion for an extension of time in which to file for rehearing.

At the hearing before the District Court on October 1, 1974, Mr. Bergman represented for the first time that the Government's failure to argue its case previously on the basis of the June 28, 1973, oral announcement was because the minutes of that hearing were not transcribed until September 1974.

At the October 1, 1974, hearing, and at the resumption of the remand hearing on October 2, 1974, defense counsel argued that, because of the specific language of this Court's remand mandate, the District Court was without power to con-

sider the efficacy of the June 28 oral announcement of readiness. Following the close of the remand hearing, Judge Costantino ruled that appellant had not been unavailable during the June 19-28, 1973, period (the factual issue left unresolved by this Court's mandate), but refused to dismiss the indictment, on the ground that the June 28 oral announcement of readiness satisfied the Government's obligations under the Prompt Disposition Plan:

... A contention first raised at this time is dispositive of the Rule 4 question. This contention is that the Government complied with Rule 4 by reason of the Assistant United States Attorney's oral statement of readiness at defendant's June 28 arraignment.

(137-38).

Based on the facts in this case, the District Court was, because of the mandate rule, without power to entertain the question of the efficacy of the June 28 oral notice. That rule was recently applied by this Court in Zdanok v. Glidden Co., 327 F.2d 944 (2d Cir.), cert. denied, 377 U.S. 1934 (1964), where this Court rejected Glidden's assertion, identical to the Government's in this case, that they be permitted to argue previously unrelayed upon facts on remand on an issue decided by this Court. A previous appeal (288 F.2d 99 (1961)), had decided the issue of liability on Zdanok's breach of employment contract claim and had remanded the matter for a hearing on damages. At the remand hearing the district court judge permitted Glidden to introduce previously known but unrelayed upon facts on the issue of liability. Judge

Friendly, writing for this Court, ruled that the mandate precluded Glidden from introducing the previously unused liability evidence:

... As indicated at the outset, Glidden's contention that we should now reach a different result as to its liability ... rests on the [new] testimony offered or sought to be offered [at the remand proceeding] (as well as the inference from plaintiff's failure to contradict the testimony that was admitted)

We can dispose of the ... contention rather readily -- the district court had no power to consider the testimony on which Glidden relies. The Zdanok case was tried in 1960 on the issues of liability as fully as the parties wished. Nothing in the Court's opinion gives the slightest support to any idea that it considered itself to be dealing with an issue but partially tried, in which Glidden possessed evidence helpful to its cause but not yet presented; nor did Glidden's briefs here, or even its petition to the Supreme Court for certiorari, at all suggest this.... We remanded for the district court to go into the issue which, by agreement, had been left undetermined at the first trial -- whether plaintiffs could establish damages from defendant's breach and, if so, how much. Without leave from this court the district court could not lawfully consider further evidence on the issue of liability. [Citations omitted.] So far as the Zdanok action is concerned, we need not discuss plaintiff's alleged failure to object to the introduction of some of the evidence. The question goes to the power of the district court to receive it.

Zdanok v. Glidden Co., supra,
327 F.2d at 949-50.

See also In re Potts, 166 U.S. 267 (1897); In re Sanford Fork & Tool Co., 160 U.S. 247, 255 (1895);* Sibbald v. United States, 37 U.S. 488, 492 (1838); Crane Co. v. American Standard, Inc., 490 F.2d 332, 341 (2d Cir. 1973); Greater Boston Television Corp. v. F.C.C., 463 F.2d 268, 279 (D.C. Cir. 1971); Monro v. Post, 102 F.2d 686, 688 (2d Cir. 1939).

The decision of this Court in this case, based on the Government's representations in its brief and at oral argument, specifically incorporated the July 24, 1973, date. Furthermore, the Government failed to raise the June 28 oral notice issue in its motion for an extension of time in which to file for rehearing. Thus, the Government's failure to raise the June 28 oral notice issue in this Court conclusively precludes

*The mandate rule, which applies when a case is remanded from the Supreme Court to a circuit court, as well as from a circuit court to a district court, was stated by Mr. Justice Gray as follows:

... When a case has once been decided by this court of appeal, and remanded to the Circuit Court, whatever was before this court, and disposed of by its decree, is considered as finally settled. The Circuit Court is bound by the decree as the law of the case; and must carry it into execution, according to the mandate. That court cannot vary it, or examine it for any other purpose than execution; or give any other or further relief; or review it, even for apparent error, upon any matter decided on appeal; or intermeddle with it further than to settle so much as has been remanded.

In re Sanford Fork & Tool Co.,
supra, 160 U.S. at 255.

alteration of this Court's judgment by the District Court based on that fact. As Judge Friendly recently wrote, "the District Court must carry out the mandate of the Court of Appeals, even if the mandate was in error.... The remedy of the aggrieved party is to seek a modification of the mandate." Crane Co. v. American Standard, Inc., supra, 490 F.2d at 341.

Moreover, Mr. Bergman's September 1974 discovery of the June 28, 1973, hearing minutes does not relieve the Government of the preclusion necessitated by the doctrine of the mandate rule. The Government had actual notice of the June 28, 1973, hearing -- Assistant United States Attorney Robert Clarey represented the Government at that hearing, gave the oral notice of readiness, and continued to represent the Government at trial. Thus, the Government was certainly aware of the June 28, 1973, hearing. Its failure to docket those minutes in this Court for consideration by this Court precludes the Government from now relying on that hearing.

Since, directing himself to the specific question on remand, Judge Costantino found that appellant was not unavailable during the June 19-28, 1973, period, it was error for him to refuse to dismiss the indictment, as required by the mandate of this Court.

CONCLUSION

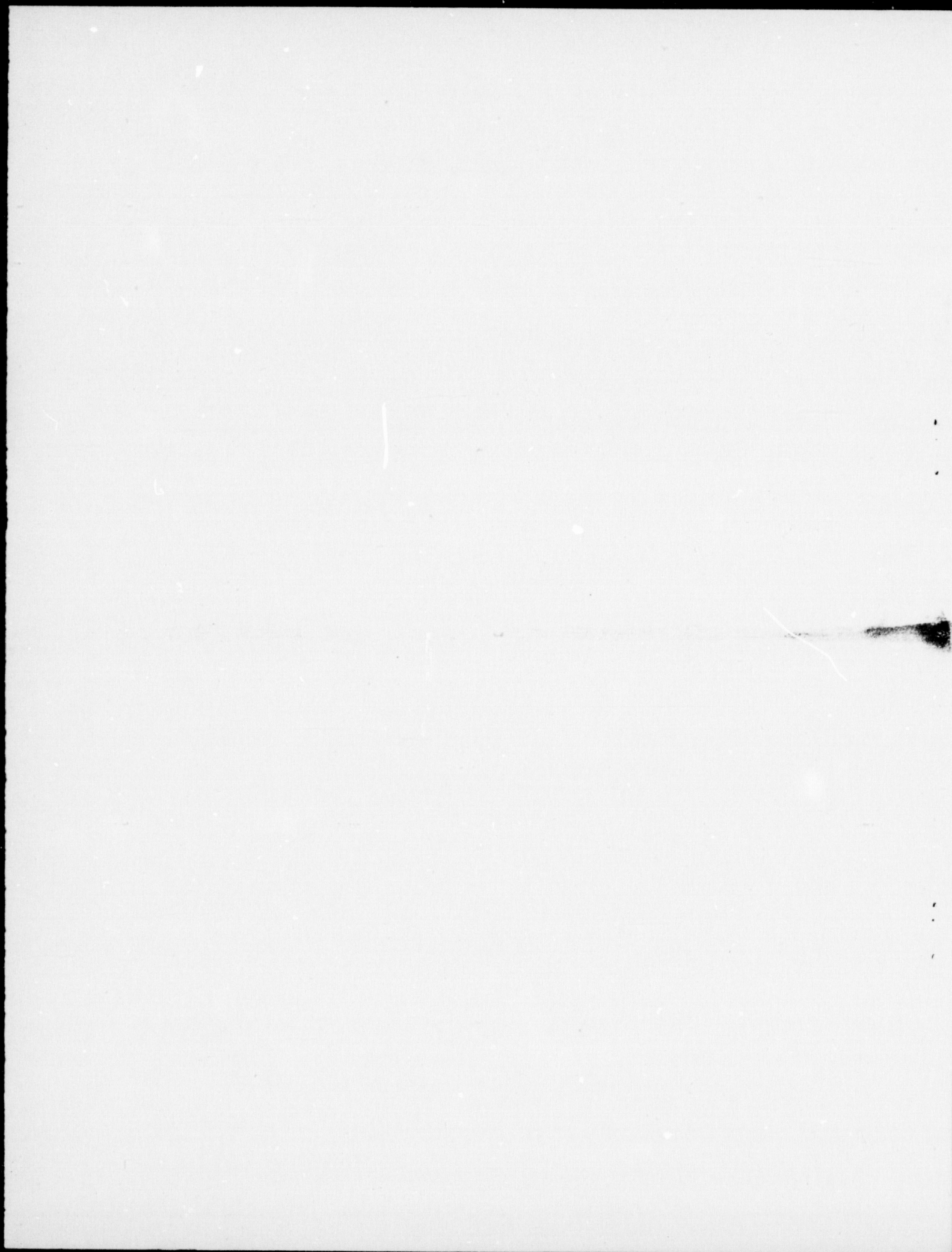
For the above-stated reasons, the judgment of the District Court entered on October 21, 1974, should be vacated, and the indictment dismissed.

Respectfully submitted,

WILLIAM J. GALLAGHER, ESQ.,
THE LEGAL AID SOCIETY,
Attorney for Appellant
FEDERAL DEFENDER SERVICES UNIT
509 United States Court House
Foley Square
New York, New York 10007
(212) 732-2971

WILLIAM EPSTEIN,
Of Counsel

October 29, 1974



Certificate of Service

October 29, 1974

I certify that a copy of this brief and appendix
has been mailed to the United States Attorney for the
Eastern District of New York.

William Epstein